

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

FORTUNET, INC.,

Plaintiff,

v.

GAMETECH ARIZONA CORP., and
GAMETECH INTERNATIONAL, INC.,

Defendants.

2:06-CV-00393-PMP-PAL

ORDER

Presently before the Court is Plaintiff FortuNet, Inc.'s Motion for Partial Summary Judgment on the Issue of GTI's Violation of Nevada Gaming Law (Doc. #74) with supporting exhibits (Doc. #76, #77, #78), filed on July 14, 2008. Defendants filed an Opposition (Doc. #88) on August 20, 2008. Plaintiff filed a Reply (Doc. #97) on September 12, 2008.

Also before the Court is Defendants' Motion for Summary Judgment (Doc. #75), filed on July 14, 2008. Plaintiff filed an Opposition (Doc. #90) on August 20, 2008. Defendants filed a Request to File Defendants' Reply to Plaintiff's Opposition to Defendants' Motion for Summary Judgment Under Seal (Doc. #99) and a Reply (Doc. #100) on September 12, 2008.

Also before the Court is Plaintiff's Motion in Limine and to Strike (Doc. #79) with supporting exhibit (Doc. #80), filed on July 15, 2008. Defendants filed an Opposition (Doc. #86) and Cross-Motion to Strike and for Sanctions (Doc. #92) on August 20, 2008. Plaintiff filed a Reply (Doc. #95) and Opposition (Doc. #96) on September 12, 2008. Defendants filed a Reply (Doc. #101) on September 26, 2008.

1 Also before the Court is Defendants' Motion to Strike Plaintiff's Expert
2 Disclosure and Report of Scott Scherer and for Entry of Order Precluding Mr. Scherer from
3 Testifying in this Action (Doc. #81), filed on July 18, 2008. Plaintiff filed an Opposition
4 (Doc. #89) on August 20, 2008. Defendants filed a Reply (Doc. #98) on September 12,
5 2008.

6 Also before the Court is Defendants' Request to File Defendants' Opposition to
7 Plaintiff's Motion for Partial Judgment on the Issue of GTI's Violation of Nevada Gaming
8 Law Under Seal (Doc. #87), filed on August 20, 2008. Plaintiff did not file an opposition.

9 **I. BACKGROUND**

10 Plaintiff FortuNet, Inc. ("FortuNet") is a Nevada corporation involved in the
11 development and manufacture of electronic gaming devices, including bingo games. (Am.
12 Compl. (Doc. #21) at 1-2.) Defendant GameTech International, Inc. ("GTI") is a Delaware
13 corporation involved in the manufacture and sale of electronic gaming equipment. (Pl.'s
14 Statement of Material Facts ["Pl.'s SMF"] (Doc. #76), Ex. 3 at F-7.) Defendant GameTech
15 Arizona Corporation ("GTA") is an Arizona corporation, and is GTI's wholly-owned
16 subsidiary. (Defs.' Mot. for Summ. J. ["Defs.' Mot."] (Doc. #75), Ex. 3 at 15; Pl.'s SMF,
17 Ex. 1, Ex. 6 at 10.)

18 Plaintiff contends Defendants engaged in racketeering activity by manufacturing,
19 selling, and distributing gaming devices in Nevada without a Nevada gaming license.
20 Specifically, Plaintiff contends two of GTA's products, Bingo Enhanced Tabs System
21 ("BETS") and Pay-N-Play, required a Nevada license to manufacture or distribute from
22 Nevada. According to Plaintiff, GTI developed aspects of these two software products in
23 Nevada and distributed the products from Nevada without a Nevada license. Plaintiff
24 asserts GTI operated GTA as a sham to make it appear as if development, manufacture, and
25 distribution occurred in California when it did not. Plaintiff also contends Defendants
26 falsely advertised they were Nevada-licensed entities when they were not. Plaintiff asserts

1 that by advertising a Nevada address, GTI falsely represented to customers it had a Nevada
2 gaming license.

3 GTI is located in Reno, Nevada. (Pl.'s SMF, Ex. 3 at 1.) GTI formed its wholly-
4 owned subsidiary, GTA, to develop certain types of gaming devices, specifically Pay-N-
5 Play and BETS, which GTI was not licensed to develop in Nevada. (Defs.' Mot., Ex. 3 at
6 16-17; Pl.'s SMF, Dep. of Michael Hartman at 17-18.) Pay-N-Play permits players to
7 purchase bingo cards on a game-by-game basis rather than for a fixed number of games and
8 BETS is a pull-tab game system. (Pl.'s SMF, Ex. 2 at 2, 5.) BETS and Pay-N-Play
9 incorporate cashless wagering systems which would require a Nevada license to
10 manufacture, sell, or distribute from Nevada. (Pl.'s SMF, Dep. of Michael Hartman at 17-
11 18.)

12 GTI rented for GTA a facility in Truckee, California. (Pl.'s SMF, Ex. 6 at 6-7,
13 Ex. 17; Defs.' Mot., Ex. 3 at 18.) Programming for the cashless wagering system aspect of
14 BETS was performed at the Truckee facility, but programming for the player user interface
15 took place in Reno. (Pl.'s SMF, Dep. of Michael Hartman at 20-21.) The algorithm which
16 shuffled the pull-tab tickets for BETS was written in Reno. (Id. at 81-82.) Testing and
17 troubleshooting on Pay-N-Play and BETS took place on a test bed¹ at GTA's Truckee,
18 California location, and no such work was performed on these products in Reno. (Defs.'
19 Mot., Ex. 7 at 22, 24, Ex. 8 at 21-22, 27, 29, 27, 29-40, 46-48; Pl.'s SMF, Dep. of Nelson
20 Rudd at 31.) BETS and Pay-N-Play software source code was maintained in Reno, but
21 could not be worked on in the Reno office. (Pl.'s SMF, 2/29/08 Dep. of Justin Goodman at
22 27.) To work on the source code for these two products, employees had to log into
23 computers in Truckee, download the source code, work on it in Truckee, compile the
24

25 ¹ A "test bed" is a set of computers used to test different pieces of software for functionality
26 and development. (Pl.'s SMF, Dep. of Nelson Rudd at 31.)

1 software, test it in Truckee, and then save the source code back to the database in Reno.
2 (Id. at 27-28.)

3 To distribute Pay-N-Play, BETS, and a third-party vendor's product called Game
4 Suite, GTA loaded the software onto hardware in Truckee, California, and shipped the
5 products to customers from Truckee. (Defs.' Mot., Ex. 8 at 28-30.) However, invoices for
6 GTA listed GTI's address in Reno. (Pl.'s SMF, Ex. 10.)

7 GTI and GTA maintained a joint customer support number that was answered in
8 the Reno GTI office, which also had a test bed. (Pl.'s SMF, 2/29/08 Dep. of Justin
9 Goodman at 7-8.) GTI technicians provided telephone customer support on GTI and GTA
10 products through this phone number, however, when more serious problems developed with
11 BETS and Pay-N-Play, GTI employees would travel to the Truckee facility's test bed to
12 diagnose the problem. (Id. at 8, 13-14.) GTA had no employees of its own. (Pl.'s SMF,
13 Ex. 9 at 4.) Rather, it "borrow[ed] employees from GTI and [paid] GTI for such services."
14 (Id.)

15 GTI and GTA also operated a joint website at <http://www.gametech-inc.com>.
16 (Pl.'s SMF, Ex. 6 at 5.) On its website, GTI describes itself as a "leading supplier of a
17 comprehensive line of electronic bingo equipment, including hand-held bingo units, fixed
18 base units and turnkey account and management software." (Defs.' Mot., Ex. 2 at 1.) The
19 website lists several GTI/GTA products, including Pay-N-Play. (Id.) According to the
20 website, Pay-N-Play is "offered by GameTech Arizona Corporation," at GTA's Truckee,
21 California address. (Id.) GTI's website also contains the following disclaimer:

22 Important Notice: Some or all of our products may not be legal in your
23 jurisdiction. Due to rapidly changing laws and regulations GameTech
24 cannot be responsible for the legality or use of this product by any
particular customer. All customers should determine for themselves
that the use of this product is permitted in their market.

25 (Id.)

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1 GTI and GTA operated in this fashion until the Nevada Gaming Control Board
2 issued GTI a license to manufacture and distribute gaming devices in Nevada in October
3 2006. (Defs.' Mot., Ex. 4; Pl.'s SMF, Ex. 18.) Thereafter, GTA ceased to operate out of
4 the Truckee location. (Pl.'s SMF, Dep. of Jay Meilstrup at 21.)

5 In relation to this lawsuit, Plaintiff's President, Yuri Itkis ("Itkis"), could not
6 identify any customers that were deceived by any GTI or GTA advertisement. (Defs.' Mot.,
7 Ex. 13 at 44, 47-48.) Itkis testified that he presumed GTI's customers were deceived
8 because "they are still GameTech's customers and not ours." (Id.) Itkis also could not
9 identify any lost sales or lost revenue as a result of any GTI advertisement or representation.
10 (Id. at 48-52.) Plaintiff's expert, Scott Hampton, also could not identify a customer
11 deceived by GTI/GTA's advertising or a lost sale as a result. (Defs.' Mot., Ex. 16 at 38-
12 39.)

13 Plaintiff brought suit in this Court asserting against Defendants claims for false
14 advertising under the Lanham Act (count one), false advertising under the Nevada
15 Deceptive Trade Practices Act ("NDTPA") (count two), violations of the Racketeer
16 Influenced and Corrupt Organizations Act ("RICO") (count three), and common law false
17 advertising and unfair competition (count four). In response to Defendants' previous
18 motion to dismiss, this Court entered an Order (Doc. #38) holding Plaintiff's claim under
19 the NDTPA in count two and Plaintiff's common law unfair competition claim in count
20 four were preempted under Nevada law. Thus, Plaintiff's remaining claims are RICO, false
21 advertising under the Lanham Act, and common law false advertising.

22 Plaintiff now moves for partial summary judgment on the issue of whether
23 Defendants violated Nevada gaming laws in support of Plaintiff's RICO claim. Plaintiff
24 argues no genuine issue of material fact remains that Defendants manufactured and
25 distributed BETS and Pay-N-Play from Nevada in contravention of Nevada gaming law.
26 Plaintiff also moves to strike Defendants' references to the fact that the Nevada Gaming

1 Control Board ultimately issued Defendants a license. Plaintiff contends that without being
2 able to examine what Defendants told the Board about Defendants' activities, Defendants
3 should not be able to infer the Board knew everything about Defendants' conduct and
4 nevertheless granted a license.

5 Defendants move for summary judgment on all of Plaintiff's remaining claims,
6 raising a variety of arguments in support. Defendants also move to strike Plaintiff's expert,
7 and move to strike a statement in Plaintiff's brief that GTI's president, Jay Meilstrup
8 ("Meilstrup"), perjured himself. Defendants request sanctions for Plaintiff's statement and
9 for Plaintiff's refusal to retract it.

10 **II. SUMMARY JUDGMENT**

11 Defendants argue all of Plaintiff's claims fail because Plaintiff cannot establish
12 causation or damages. Additionally, Defendants argue Plaintiff's RICO claim fails because
13 GTI and GTA are not a separate person and enterprise under RICO and Plaintiff can present
14 no evidence Defendants violated Nevada gaming laws. As to Plaintiff's Lanham Act and
15 common law false advertising claims, Defendants contend no evidence exists that any
16 customer was deceived by Defendants' advertisements.

17 Plaintiff responds that it can establish damages as it is entitled to recover
18 Defendants' unjustly obtained profits. Plaintiff also argues GTI and GTA, as separate
19 corporate entities, may constitute a separate person and enterprise under RICO. As to the
20 false advertising claims, Plaintiff contends it need not show any customer was actually
21 deceived where Defendants' advertisements were literally false.

22 Summary judgment is appropriate if "the pleadings, the discovery and disclosure
23 materials on file, and any affidavits show that there is no genuine issue as to any material
24 fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).
25 The substantive law defines which facts are material. Anderson v. Liberty Lobby, Inc., 477
26 U.S. 242, 248 (1986). All justifiable inferences must be viewed in the light most favorable

1 to the non-moving party. County of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148,
2 1154 (9th Cir. 2001).

3 The party moving for summary judgment bears the initial burden of showing the
4 absence of a genuine issue of material fact. Fairbank v. Wunderman Cato Johnson, 212
5 F.3d 528, 531 (9th Cir. 2000). The burden then shifts to the non-moving party to go beyond
6 the pleadings and set forth specific facts demonstrating there is a genuine issue for trial.
7 Id.; Far Out Prods., Inc. v. Oskar, 247 F.3d 986, 997 (9th Cir. 2001).

8 **A. RICO - Count Three**

9 Plaintiff brings count three under 18 U.S.C. § 1964(c) alleging Defendants
10 conducted an enterprise's affairs through a pattern of racketeering activity in violation of 18
11 U.S.C. § 1962(c). (Am. Compl. at 6-7.) Section 1964(c) permits "[a]ny person injured in
12 his business or property by reason of a violation of section 1962 of this chapter" to sue and
13 recover three times the "damages he sustains" plus the costs of the suit. To establish a
14 claim under the federal civil RICO statute, a plaintiff must allege and prove "(1) conduct
15 (2) of an enterprise (3) through a pattern (4) of racketeering activity (5) causing injury to
16 plaintiffs' 'business or property.'" Ove v. Gwinn, 264 F.3d 817, 825 (9th Cir. 2001)
17 (quoting 18 U.S.C. § 1964(c)).

18 To prove causation for a claim under § 1964(c), a plaintiff must show the
19 defendant's racketeering activity "not only was a 'but for' cause of his injury, but was the
20 proximate cause as well." Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 268 (1992).
21 To determine whether a plaintiff has shown proximate cause, the Court considers three
22 factors:

23 (1) whether there are more direct victims of the alleged wrongful
24 conduct who can be counted on to vindicate the law as private
25 attorneys general; (2) whether it will be difficult to ascertain the
26 amount of the plaintiff's damages attributable to defendant's wrongful
conduct; and (3) whether the courts will have to adopt complicated
rules apportioning damages to obviate the risk of multiple recoveries.

1 Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1055 (9th Cir. 2008).

2 The United States Supreme Court analyzed a civil RICO claim similar to the
3 present suit and determined the plaintiff failed to establish proximate cause. In Anza v.
4 Ideal Steel Supply Corp., the plaintiff sold steel mill products and related supplies and
5 services. 547 U.S. 451, 453 (2006). The defendants were the plaintiff's primary competitor
6 and its owners. Id. at 453-54. The plaintiff brought a civil RICO claim, asserting the
7 defendants engaged in a racketeering scheme aimed at increasing sales and market share at
8 the plaintiff's expense. Id. at 454. The plaintiff alleged the defendants did not charge sales
9 tax to cash-paying customers which permitted the defendants to reduce prices without
10 affecting profit margin. Id. The defendants submitted false tax returns to the State of New
11 York in furtherance of this scheme. Id. The plaintiff thus brought two civil RICO claims
12 alleging mail and wire fraud based on the mailed and electronically filed false tax returns as
13 the racketeering activity. Id.

14 The Supreme Court ruled the plaintiff failed to establish the defendants' alleged
15 racketeering activity proximately caused harm to the plaintiff because "the cause of [the
16 plaintiff's] asserted harms . . . is a set of actions (offering lower prices) entirely distinct
17 from the alleged RICO violation (defrauding the State)." Id. at 458. In reaching this
18 conclusion, the Supreme Court noted the difficulty in ascertaining damages where the
19 plaintiff alleged loss of sales resulting from its competitor's decreased prices for
20 cash-paying customers. The Court noted that the defendants "could have lowered . . . prices
21 for any number of reasons unconnected to the asserted pattern of fraud." Id.

22 Moreover, a "second discontinuity" existed between the RICO violation and the
23 asserted injury because the plaintiff's lost sales "could have resulted from factors other than
24 [the defendants'] alleged acts of fraud. Businesses lose and gain customers for many
25 reasons, and it would require a complex assessment to establish what portion of [the
26 plaintiff's] lost sales were the product of [the defendants'] decreased prices." Id. at 459.

1 Finally, the Court concluded the complex damages calculation that would be
2 required demonstrated proximate cause was lacking:

3 A court considering the claim would need to begin by calculating the
4 portion of [the defendants'] price drop attributable to the alleged
5 pattern of racketeering activity. It next would have to calculate the
6 portion of [the plaintiff's] lost sales attributable to the relevant part of
7 the price drop. The element of proximate causation recognized in
8 Holmes is meant to prevent these types of intricate, uncertain inquiries
9 from overrunning RICO litigation. It has particular resonance when
10 applied to claims brought by economic competitors, which, if left
11 unchecked, could blur the line between RICO and the antitrust laws.

12 Id. at 459-60.

13 Here, a more direct victim of the alleged wrongful conduct exists that can be
14 counted on to vindicate Nevada gaming laws. Nevada has enacted a comprehensive
15 statutory scheme for regulating gaming. See Nev. Rev. Stat. tit. 41, ch. 463. To the extent
16 GTI has evaded Nevada's gaming law requirements, Nevada's Gaming Control Board and
17 Commission are well suited to address any such violations.

18 Additionally, it will be difficult to ascertain the amount of Plaintiff's damages
19 attributable to GTI's alleged wrongful conduct. The Court would have to calculate the
20 portion of GTI's sales attributable to its alleged evasion of Nevada gaming laws. Even
21 assuming Plaintiff is correct that any sale of BETS and Pay-N-Play is attributable to GTI's
22 wrongful conduct, the Court next would have to calculate the portion of Plaintiff's lost sales
23 attributable to GTI's allegedly wrongful behavior. Plaintiff has failed to present evidence
24 on this issue. Plaintiff cannot identify a single lost sale resulting from GTI's alleged
25 evasion of Nevada gaming laws and Plaintiff's damages expert specifically did not address
26 "the magnitude of FortuNet's lost sales as of the report date." (Pl.'s Opp'n to Defs.' Mot.
for Summ. J. ["Pl.'s Opp'n"] (Doc. #90), Ex. 36 at 1.)

27 Plaintiff contends it is entitled to all of GTI's profits from the sale of BETS and
28 Pay-N-Play based on its conclusion that any sales to GTI are lost sales to Plaintiff.
29 However, the evidence before the Court demonstrates there are several competitors in the

1 field. (Pl.'s SMF, Ex. 2 at 7 (listing as GTI's competitors in the industry California
2 Concepts; Bettina Corp.; Bingo Brain, Inc.; EZ Bingo; FortuNet, Inc.; Planet Bingo; and
3 BK Entertainment).) Consequently, a customer who purchased from GTI is not necessarily
4 a lost sale for Plaintiff. The customer may have chosen to do business with one of
5 Plaintiff's other competitors rather than Plaintiff. Plaintiff has not presented an affidavit or
6 testimony from a single customer stating that if it had known GTI was evading Nevada
7 gaming laws, it would have purchased products from Plaintiff rather than from GTI or from
8 Plaintiff's other competitors. This leads to the final difficulty with Plaintiff's causation
9 argument. Permitting Plaintiff to recover all of GTI's profits without apportioning for those
10 sales lost only to Plaintiff would lead to the risk of multiple recoveries, as GTI's other
11 competitors could make the same allegations and also seek to recover all of GTI's profits.

12 For these reasons, Plaintiff has failed to raise a genuine issue of material fact that
13 Defendants' alleged racketeering activity proximately caused harm to Plaintiff. The Court
14 will grant Defendants' motion for summary judgment as to count three. Because the Court
15 is granting Defendants' motion for summary judgment on Plaintiff's RICO claim, the Court
16 will deny as moot Plaintiff's motion for partial summary judgment as to Defendants'
17 evasion of Nevada gaming laws. Additionally, because Plaintiff's expert testimony is
18 directed at Defendants' alleged racketeering activity, the Court will deny as moot
19 Defendants' motion to strike Scott Scherer's report. The Court also will deny as moot
20 Plaintiff's Motion in Limine and to Strike, as the testimony regarding GTI's Nevada license
21 is relevant only to the RICO claim.

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B. Lanham Act (count one) & Common Law False Advertising (count four)²

To establish a false advertising claim under § 43(a) of the Lanham Act (15 U.S.C. § 1125(a)), a plaintiff must show:

(1) a false statement of fact by the defendant in a commercial advertisement about its own or another's product; (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience; (3) the deception is material, in that it is likely to influence the purchasing decision; (4) the defendant caused its false statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to defendant or by a lessening of the goodwill associated with its products.

Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139 (9th Cir. 1997) (footnote omitted). Falsity under the Lanham Act includes statements that are literally false, either on their face or by necessary implication, or statements that are literally true but likely to mislead or confuse consumers. Id. "Where a statement is not literally false and is only misleading in context . . . proof that the advertising actually conveyed the implied message and thereby deceived a significant portion of the recipients becomes critical." William H. Morris Co. v. Group W, Inc., 66 F.3d 255, 258 (9th Cir. 1995). However, where a defendant intentionally misled consumers or the advertisement is literally false, a presumption arises that consumers were in fact deceived and the burden shifts to the defendant to prove otherwise. Time Warner Cable, Inc. v. DIRECTV, Inc., 497 F.3d 144, 153 (2d Cir. 2007); William H. Morris Co., 66 F.3d at 258.

The presumption consumers were deceived by a literally false ad does not permit a plaintiff to recover damages "without other proof that such damages occurred." Balance Dynamics Corp. v. Schmitt Indus., Inc., 204 F.3d 683, 693 (6th Cir. 2000). Thus, in addition to establishing falsity (either by presumption or through direct proof customers

² The parties have treated Plaintiff's common law false advertising claim as identical to its Lanham Act false advertising claim, and the Court therefore will do the same without citation to Nevada false advertising law.

1 actually were deceived), a plaintiff must prove “both the fact and the amount of damage.”
2 Lindy Pen Co., Inc. v. Bic Pen Corp., 982 F.2d 1400, 1407 (9th Cir. 1993). In some
3 circumstances, harm to the plaintiff is presumed. For example, where a defendant
4 advertises its own products as the plaintiff’s (“palming off”) or engages in direct
5 comparative advertising, “the presumption that plaintiff’s good will has suffered significant
6 damages seems justified.” Harper House, Inc. v. Thomas Nelson, Inc., 889 F.2d 197, 209
7 n.8 (9th Cir. 1989); see also Time Warner Cable, Inc., 497 F.3d at 161-62 (noting injury and
8 causation may be presumed in direct comparison false advertisement case). Courts presume
9 injury to the plaintiff from a false direct comparison ad “because a false comparison to a
10 specific competing product necessarily diminishes that product’s value in the minds of the
11 consumer.” Time Warner Cable, Inc., 497 F.3d at 161-62 (quotation omitted).

12 However, when a defendant’s advertising does not directly compare its products
13 with the plaintiff’s products, when numerous competitors participate in the market, or when
14 the plaintiff’s and defendant’s products are aimed at different market segments, “injury to a
15 particular competitor may be a small fraction of the defendant’s sales, profits, or advertising
16 expenses.” Harper House, Inc., 889 F.2d at 209 n.8. In such circumstances “it is erroneous
17 to apply a rebuttable presumption of harm in favor of a competitor. Otherwise, a plaintiff
18 might enjoy a windfall from a speculative award of damages by simply being a competitor
19 in the same market.” Porous Media Corp. v. Pall Corp., 110 F.3d 1329, 1334 (8th Cir.
20 1997) (citing Harper House, Inc., 889 F.2d at 209); see also Time Warner Cable, Inc., 497
21 F.3d at 162 (stating that an ad that is misleading regarding the defendant’s own product but
22 which does not directly reference a competitor’s product equally injures all competitors and
23 thus the plaintiff must present “some indication of actual injury and causation . . . to ensure
24 [the] plaintiff’s injury [is] not speculative”) (quotation omitted)); N. Am. Med. Corp. v.
25 Axiom Worldwide, Inc., 522 F.3d 1211, 1227 (11th Cir. 2008) (concluding the plaintiff
26 failed to show presumptive irreparable harm entitling it to injunctive relief merely by

1 establishing the defendant's non-comparative false ad and that the plaintiff was a
2 competitor in the marketplace).

3 Although a plaintiff must establish injury resulting from the defendant's false
4 advertising, once injury is established the plaintiff's inability to show actual damages does
5 not preclude recovery for a Lanham Act false advertising claim. Lindy Pen Co., Inc., 982
6 F.2d at 1411. Because it often is difficult for a plaintiff to prove actual damages in a false
7 advertising case, the Lanham Act permits a court, "subject to the principles of equity," to
8 award damages based on the defendant's profits on an unjust enrichment theory. 15 U.S.C.
9 § 1117(a); Lindy Pen Co., Inc., 982 F.2d at 1407. When assessing profits, the plaintiff need
10 prove only the defendant's sales and the defendant must prove any costs or deductions
11 therefrom. 15 U.S.C. § 1117(a). Where the damage award is based on the recovery of the
12 defendant's profits, the Court, in its discretion, may adjust the judgment to "such sum as the
13 court shall find to be just, according to the circumstances of the case." Id.; Southland Sod
14 Farms, 108 F.3d at 1146 (stating the Court, in its discretion, may "fashion relief, including
15 monetary relief, based on the totality of the circumstances"). In making these
16 determinations, the Court should consider the nature of the infringing conduct, the
17 defendant's intent, and any adverse effects on the plaintiff. Lindy Pen Co., Inc., 982 F.2d at
18 1405. An award of the defendant's profits "shall constitute compensation and not a
19 penalty." 15 U.S.C. § 1117(a).

20 1. GTI's Website

21 Plaintiff asserts GTI's website, which lists GTI at its Reno, Nevada address as the
22 entity to contact, "necessarily implies" GTI is licensed in Nevada to manufacture and
23 distribute the products listed on its website. (Pl.'s Opp'n at 16.) However, GTI's listing of
24 its address is literally true. Because GTI's listing of its corporate address in Nevada is not
25 literally false and purportedly is misleading only in context, Plaintiff must present proof that
26 the website actually conveyed the implied message that GTI was Nevada-licensed and

1 thereby deceived a significant portion of customers who viewed the website. Plaintiff has
2 presented no evidence raising a genuine issue of material fact that a single customer
3 received the implied message and was deceived by it. Moreover, Plaintiff has not presented
4 any evidence it lost a single sale or suffered some damage to its own goodwill as a result.
5 Defendants therefore are entitled to summary judgment as to Plaintiff's Lanham Act and
6 common law false advertising claims based on the listing of the Nevada address and the
7 supposedly implied impression from the website that GTI is Nevada-licensed.

8 2. Manufacture of Pay-N-Play in Reno

9 Plaintiff next contends GTI distributed ads at trade shows stating that Pay-N-Play
10 is offered by GameTech at its Reno, Nevada address and stating Pay-N-Play is a registered
11 trademark of GTI. Plaintiff argues these two statements suggest to a consumer that GTI
12 was licensed to develop, manufacture, and distribute Pay-N-Play from Nevada. Plaintiff
13 also asserts other advertisements which list GTA as the offering entity are false because
14 GTA did not develop Pay-N-Play from California. Additionally, Plaintiff contends the ads
15 convey an "overall commercial impression" that Pay-N-Play comes from "GameTech."
16 (Pl.'s Opp'n at 18.) Finally, Plaintiff argues Defendants falsely represented the Reno
17 facility was part of GTA.

18 Defendants have advertised Pay-N-Play with a flyer listing GTI's Reno, Nevada
19 address. (Pl.'s Opp'n, Ex. 28.) The flyer also identifies GTI as the trademark holder to the
20 name Pay-N-Play. (Id.) However, the advertisement does not state that GTI is a Nevada-
21 licensed entity. While perhaps a consumer would be left with that impression from the
22 context of the flyer combined with the Nevada address, Plaintiff has failed to present
23 evidence raising a genuine issue of material fact that any customer received the implied
24 message and was deceived by it, or that Plaintiff lost a sale or suffered other harm as a
25 result.

26 ///

1 As for the advertisements related to GTA, the ads state the product is “offered
2 by” GTA out of California. The ads make no statement about where Pay-N-Play was
3 developed or manufactured, and Plaintiff has presented no evidence any customer received
4 an implied message that Pay-N-Play was developed or manufactured in California and was
5 deceived by that implied message. Further, Plaintiff has presented no evidence any
6 customer received an implied message that GTI and GTA were the same entity operating
7 out of the Reno facility, and that as a result, the customer wrongly believed all products
8 were Nevada-licensed as they emanated from Reno, Nevada. As with Plaintiff’s other
9 claims, Plaintiff also fails to present any evidence of lost sales or other harm resulting from
10 Defendants’ alleged false advertising. The Court therefore will grant Defendants’ motion
11 for summary judgment on Plaintiff’s Lanham Act and common law false advertising claims
12 based on these arguments.

13 3. BETS as a GTA Product

14 Next, Plaintiff contends Defendants’ advertisements of BETS are literally false
15 because Defendants advertise BETS as a GTA product when it was made and sold in Reno
16 by GTI. Additionally, the ads identify BETS as a GTA trademark when GTI owns the
17 mark, and the use of similar marks creates the commercial impression the companies are the
18 same and all products come from Reno, Nevada. Finally, Plaintiff contends Defendants’
19 advertising gives the impression that BETS is a “GameTech” product, not a GTI product.

20 Some of Defendants’ advertisements identify BETS as a trademark of GTA.
21 (Pl.’s SMF, Ex. 4.) However, the mark actually is registered to GTI.³ (Pl.’s SMF, Ex. 14.)
22 Further, the ads contain a “GameTech” logo without specifying whether that logo refers to
23 GTI or GTA.

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26 ³ Defendants suggest GTI may have licensed the mark to GTA, however, Defendants provide
no evidence in support.

1 While this evidence raises a genuine issue of material fact that the advertisements
2 are literally false as to the true holder of the trademark, Plaintiff fails to explain how the
3 fact that GTI advertises its wholly owned subsidiary as the owner of a certain registered
4 mark, when instead GTI owns the mark, is material or caused Plaintiff any injury. Even
5 assuming mere ownership of a trademark could imply possession of a Nevada gaming
6 license, the alleged falsity of these particular advertisements would not support Plaintiff's
7 theory that Defendants' advertisements imply a Nevada license. The advertisements at
8 issue identify GTA as the trademark owner, and thus, if anything, would imply the product
9 emanates from California, not Nevada. Further, as the Court previously explained, Plaintiff
10 has not identified a single customer who received the implied message that GTI and GTA
11 are the same entity operating out of Reno, Nevada and hence are Nevada-licensed, or any
12 customer that was deceived by such an implied message.

13 Moreover, Plaintiff has not connected the alleged falsity of these ads to any harm
14 to Plaintiff. Awarding to Plaintiff all of Defendants' profits merely because their
15 advertisements identified the wholly owned subsidiary as the trademark owner rather than
16 the parent, or because they put pictures of the Reno facility on a GTA brochure without any
17 evidence consumers would even be able to identify the Reno facility as a Nevada location,
18 would not comport with equitable principles. As with Plaintiff's other claims, Plaintiff
19 seeks to hold Defendants liable for an implied misrepresentation without submitting proof
20 that any customers received the implied message, were deceived by it, and would have
21 purchased products from Plaintiff--rather than other competitors--had they know the truth.
22 An award of Defendants' profits under these circumstances would amount to a penalty, not
23 compensation. The Court therefore will grant Defendants' motion for summary judgment
24 with respect to a damages claim for alleged false advertising related to the BETS trademark,
25 and for alleged false advertising regarding pictures of the Reno facility on GTA ads and the
26 "overall commercial impression" that the two entities are the same, operate out of Reno,

1 and thus are Nevada-licensed.

2 4. BETS as Class II Gaming

3 Finally, Plaintiff contends Defendants' advertisements that BETS is class II
4 gaming are literally false. Plaintiff asserts the advertising of a game as class II is material
5 because class II games do not require the same regulation and licensing as a class III game
6 does. Plaintiff asserts BETS is not class II gaming because it does not employ any tangible
7 medium, such as paper pull-tabs, for use in conjunction with the electronic device.
8 Defendants respond that BETS is class II because it can be played in a tangible paper
9 medium. Defendants also contend Plaintiff cannot show damages.

10 The Indian Gaming Regulatory Act ("IGRA") provides "a statutory basis for the
11 operation of gaming by Indian tribes as a means of promoting tribal economic development,
12 self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). IGRA places games
13 played on Indian land into three classes: class I consists of traditional Indian games or social
14 games played for prizes of minimal value; class II includes bingo and games similar to
15 bingo, plus certain card games; class III is comprised of all games not in classes I or II. See
16 id. §§ 2703(6)-(8). Categorization of games among the three classes corresponds to
17 different levels of federal, tribal, and state oversight. Cabazon Band of Mission Indians v.
18 Nat'l Indian Gaming Comm'n, 14 F.3d 633, 634-35 (D.C. Cir. 1994). For example, class
19 III games are permissible on Indian land only if the tribe has negotiated a tribal-state
20 compact approved by the Secretary of the Interior. Id. (citing 25 U.S.C. §§ 2710(d)(1) &
21 (d)(8)).

22 IGRA defines class II gaming as:

23 the game of chance commonly known as bingo (whether or not
24 electronic, computer, or other technologic aids are used in connection
therewith)--

- 25 (I) which is played for prizes, including monetary prizes,
with cards bearing numbers or other designations,
- 26 (II) in which the holder of the card covers such numbers
or designations when objects, similarly numbered or

1 designated, are drawn or electronically determined, and
2 (III) in which the game is won by the first person
3 covering a previously designated arrangement of
4 numbers or designations on such cards,
5 including (if played in the same location) pull-tabs, lotto, punch
6 boards, tip jars, instant bingo, and other games similar to bingo.

7 25 U.S.C. § 2703(7)(A)(i). Class II does not include “electronic or electromechanical
8 facsimiles of any game of chance or slot machines of any kind.” Id. § 2703(7)(B)(ii).

9 Congress created the National Indian Gaming Commission (“NIGC”) to regulate
10 tribal gaming. “The NIGC’s broad powers include inspecting tribes’ books and records,
11 approving tribal-state pacts, levying and collecting civil fines, monitoring and even shutting
12 down games, and promulgating regulations and guidelines it deems appropriate to
13 implement IGRA.” United States v. 103 Elec. Gambling Devices, 223 F.3d 1091, 1095 (9th
14 Cir. 2000) (citing 25 U.S.C. §§ 2705-06, 2713). Pursuant to its statutory authority, NIGC
15 has developed regulations regarding the difference between class II and class III gaming.
16 NIGC regulations include within class II gaming the game of pull-tabs. 25 C.F.R.
17 § 502.3(b).

18 Like the statute, NIGC defines class III gaming as “all forms of gaming that are
19 not class I gaming or class II gaming, including, but not limited to . . . electronic or
20 electromechanical facsimiles of games of chance.” 25 C.F.R. § 502.4. NIGC has defined
21 an electronic or electromechanical facsimile to mean “a game played in an electronic or
22 electromechanical format that replicates a game of chance by incorporating all of the
23 characteristics of the game, except when, for bingo, lotto, and other games similar to bingo,
24 the electronic or electromechanical format broadens participation by allowing multiple
25 players to play with or against each other rather than with or against a machine.” 25 C.F.R.
26 § 502.8.

BETS is a pull-tab game. (Pl.’s SMF, Dep. of Michael Hartman at 54-55.) Pull-
tabs commonly are played through a paper format. Cabazon Band of Mission Indians, 14

1 F.3d at 635. In pull-tabs, the player purchases a card from a set of cards referred to as “the
2 deal.” Id. The deal contains a predetermined number of winning cards. Id. The player
3 pulls open the paper tab on the card to determine if it is a winning card.⁴ Id.

4 Like other pull-tab games, BETS has a certain number of pre-determined winning
5 tickets within the deal. (Pl.’s SMF, Dep. of Michael Hartman at 54-55.) Although not
6 entirely clear from the parties’ submissions, it appears computer software creates the tickets
7 comprising each deal. (Id. at 81.) The tickets within the deal initially are shuffled through
8 a computer software generated algorithm to determine the order the cards will be dispensed
9 to players. (Id. at 54, 81.) BETS permits displaying the outcome of pull-tab games as
10 represented by a nine-line slot machine, where the number of lines played determines from
11 which deal of pull-tabs the player will draw. (Id. at 59-60, 62.) In addition to the electronic
12 representation, players also may play pull-tabs on BETS by purchasing paper pull-tabs,
13 which are printed at the point of sale. (Id. at 63; Pl.’s Opp’n, Dep. of Michael Hartman at
14 67; Defs.’ Reply to Pl.’s Opp’n to Defs.’ Mot. for Summ. J. (Doc. #100), Ex. 4 at 65-66.)
15 However, it is unclear whether Defendants ever pre-printed pull-tabs from the deals prior to
16 providing the product to Defendants’ customers, i.e., bingo hall operators. (Pl.’s Opp’n,
17 Dep. of Michael Hartman at 67-68.) Defendants have advertised BETS as class II gaming.
18 (Pl.’s SMF, Ex. 4.)

19 Other courts have evaluated whether certain pull-tab games or associated devices
20 constituted class II gaming. For example, in Sycuan Band of Mission Indians v. Roache,
21 the United States Court of Appeals for the Ninth Circuit considered whether the “Autotab
22 Model 101 electronic pull-tab dispenser” was an electronic aid and thus class II gaming, or
23 whether it was an electronic facsimile and thus class III gaming. 54 F.3d 535, 541 (9th Cir.
24

25 ⁴ A patent application provided as an exhibit in this case provides a similar description of a
26 traditional pull-tab game. (Pl.’s SMF, Ex. 8 at F00177.)

1 1994). The Ninth Circuit described the Autotab as:

2 a self-contained unit containing a computer linked to a video monitor
3 and a printer. The player inserts money and sees a video reproduction
4 of a paper pull-tab ticket. The player electronically reveals concealed
5 numbers to determine whether he or she is a winner. If a winner, the
6 player may cause the machine to print out a winning ticket for
7 redemption by a cashier or may add the winning amount to a credit
8 balance for further play. The game retains the fundamental
characteristics of the paper version of pull-tab: the video pull-tab
machine is supplied with a computer-chip cartridge that insures a
predetermined and known number of winning tickets from a finite pool
of tickets with known prizes; when all tickets have been played, all the
prizes will have been awarded.

9 Id. The Ninth Circuit held the Autotab was class III gaming because it consisted of
10 “self-contained computer games copying the pull-tab principle, and they are played
11 electronically.” Id. at 542.

12 The United States Court of Appeals for the D.C. Circuit likewise examined an
13 electronic version of pull-tabs in Cabazon Band of Mission Indians. For the game at issue
14 in Cabazon, the computer randomly selected a card for the player, pulled the tab at the
15 player’s direction, and displayed the result on a computer screen. 14 F.3d at 635. The D.C.
16 Circuit concluded the electronic version of pull-tabs constituted class III gaming because it
17 “exactly replicates the paper version of the game,” and “wholly incorporated [paper pull-
18 tabs] into an electronic or electromechanical version.” Id. at 636.

19 In contrast, the D.C. Circuit found a device known as the “Lucky Tab II” to be
20 class II gaming as an electronic aid, rather than an electronic facsimile. The Lucky Tab II
21 was a machine that dispensed pull-tabs from a roll containing thousands of tabs by cutting
22 the pull-tab from the roll and dropping it into a tray. Diamond Game Enters., Inc. v. Reno,
23 230 F.3d 365, 367 (D.C. Cir. 2000). The machine also contained a bar code scanner that
24 automatically read the tab and displayed the results on a video screen. Id. To collect any
25 winnings, the player had to present the winning tab to a clerk. Id. at 368.

26 ///

1 The D.C. Circuit concluded Lucky Tab II was class II because it “merely displays
2 the contents of a paper pull-tab. Instead of using a computer to select patterns, the Lucky
3 Tab II actually cuts tabs from paper rolls and dispenses them to players. In other words, the
4 game is in the paper rolls, not, as in the case of the Cabazon machine, in a computer.” Id. at
5 370. The Lucky Tab II essentially was a dispenser of paper tabs which, without the paper
6 tabs, had no gaming function, and it contained no internal computer to generate the game.
7 Id. Consequently, the D.C. Circuit found the Lucky Tab II “is not a facsimile of paper
8 pull-tabs, it is paper pull-tabs.” Id.

9 Viewing the evidence and all reasonable inferences therefrom in the light most
10 favorable to Plaintiff, a genuine issue of material fact remains regarding whether
11 Defendants falsely advertised BETS as class II gaming when in fact it is class III gaming.
12 Although the description of the game from the exhibits is not entirely clear, a reasonable
13 inference from the evidence provided is that BETS electronically generates the game
14 through software which creates the tickets and shuffles the deal prior to the product being
15 provided to Defendants’ customers. Unlike Lucky Tab II, BETS is not merely a dispenser
16 of paper pull-tabs. Rather, it is more akin to Autotab in Sycuan Band of Mission Indians or
17 the electronic pull-tabs in Cabazon Band of Mission Indians because it copies the game of
18 paper pull-tabs in electronic format. Although there was testimony players could receive
19 paper pull-tabs from BETS, a reasonable inference from the testimony is that the computer
20 generated the paper ticket. Consequently, the tangible paper tab in BETS is a paper
21 representation of an electronic game like Autotab, as opposed to the Lucky Tab II, which
22 generated an electronic representation of a paper game.

23 However, Plaintiff has not presented evidence raising a genuine issue of material
24 fact that Plaintiff was injured by Defendants’ alleged false advertising. The BETS
25 advertisements tout only Defendants’ products, and make no comparison to Plaintiff’s
26 products. Because Defendants allegedly falsely advertised their own product and did not

1 use Plaintiff's trademarks, palm off their product as Plaintiff's, or directly compare BETS
2 to Plaintiff's products, no presumption arises that Defendants' advertisements harmed
3 Plaintiff. Additionally, Plaintiff has not presented any other evidence raising a genuine
4 issue of material fact of harm. Plaintiff presented no evidence of lost sales. The evidence
5 before the Court demonstrates there were several competitors in the marketplace and
6 Plaintiff has presented no evidence that had consumers known BETS was class III instead
7 of class II, they would have purchased their products from Plaintiff rather than some other
8 competitor.

9 Where no presumption of harm to the particular plaintiff arises and the plaintiff
10 presents no other evidence of injury, the plaintiff has failed to establish an essential element
11 of its claim for damages. For example, in Harper House, Inc., the plaintiff claimed the
12 defendant deceived consumers by showing a prototype of the defendant's product in
13 advertisements and then selling a different version of the product. 889 F.2d at 208. The
14 Ninth Circuit presumed customers were deceived because the advertisements about the
15 defendant's product were literally false. Id. at 209. Additionally, the Court recognized that
16 in certain circumstances, a court may presume the amount of a Lanham Act plaintiff's
17 damages equals the amount the defendant spent in false advertising. Id. at 209 (citing
18 U-Haul Int'l, Inc. v. Jartran, Inc., 793 F.2d 1034, 1041 (9th Cir. 1986)).

19 However, "the amount defendants spent on advertising is not . . . a presumption
20 of the fact of injury. Courts distinguish between the amount of proof needed to show that
21 some damages were the certain result of a section 43(a) violation and the amount of proof
22 needed to ascertain the exact amount of damage." Id. "[A]ctual evidence of some injury
23 resulting from the deception is an essential element of the plaintiff's case." Id. at 210
24 (emphasis omitted). Because the plaintiff had presented no evidence of lost profits, no
25 evidence that consumers were deceived, and no evidence of palming off, the Ninth Circuit
26 concluded the plaintiff failed to present any evidence it was injured as a result of the

1 defendant's false advertising. Id.; see also Balance Dynamics Corp., 204 F.3d at 695
2 (holding that plaintiff's showing that defendant knowingly and willfully made false
3 statements did not entitle plaintiff to defendant's profits absent some proof the plaintiff lost
4 sales or the defendant gained sales); Texas Pig Stands, Inc. v. Hard Rock Cafe Int'l, Inc.,
5 951 F.2d 684, 695-96 (5th Cir. 1992) (holding that a jury verdict awarding the defendant's
6 profits on an unjust enrichment theory could not be sustained in the absence of proof
7 regarding palming off, trading on the plaintiff's good will, or the diversion of sales).
8 Because Plaintiff has failed to present evidence it was harmed by Defendants' allegedly
9 false advertisement, either by presumption or through other evidence, the Court will grant
10 Defendants' motion for summary judgment for a damages claim based on the alleged false
11 advertising of BETS as class II gaming.

12 5. Injunctive Relief

13 Under the Lanham Act, "'a competitor need not prove injury when suing to
14 enjoin conduct that violates section 43(a).'" Southland Sod Farms, 108 F.3d at 1145
15 (quoting Harper House, Inc., 889 F.2d at 210). The Amended Complaint seeks injunctive
16 relief under the Lanham Act, but the relief requested refers to requiring Defendants to
17 obtain a Nevada gaming license, enjoining Defendants from holding themselves out as
18 Nevada-licensed entities, and enjoining Defendants from manufacturing, selling, or
19 distributing gaming devices from Nevada.⁵ (Am. Compl. at 8-9.) In their briefing on
20 summary judgment, the parties have not addressed whether Plaintiff is entitled to injunctive
21 relief regarding other advertising for which Plaintiff has raised a genuine issue of material
22 fact regarding falsity. The Court therefore will order the parties to file supplemental briefs
23 regarding potential injunctive relief related to the advertisement of GTA as the BETS
24 trademark holder and the advertisement of BETS as class II gaming. The parties each shall

25
26 ⁵ These forms of injunctive relief are moot, as GTI now has a Nevada license.

1 file an opening brief no later than December 23, 2008. The parties each shall file a
2 response brief no later than January 9, 2009.

3 **III. MOTION TO STRIKE AND FOR SANCTIONS**

4 Defendants move to strike a statement in Plaintiff's motion in limine (Doc. #79)
5 which states GTI's director, Meilstrup, perjured himself. Defendants contend no court or
6 administrative tribunal has accused or convicted Meilstrup of perjury. Defendants also
7 request sanctions for Plaintiff's failure to retract the statement. Finally, Defendants request
8 sanctions for having to respond to Plaintiff's motion in limine because it raises issues upon
9 which this Court already has ruled. Plaintiff responds that it has presented evidence
10 Meilstrup made false statements under oath to the Texas Lottery Commission when he
11 denied ever being a professional gambler because Plaintiff presented the transcript from
12 Meilstrup's deposition at which he testified that he had been a professional gambler and
13 that is how he began working in the gaming industry. Additionally, Plaintiff argues its
14 motion in limine is meritorious and not sanctionable.

15 Meilstrup submitted forms to the Texas Lottery Commission in 2006 and 2007
16 which asked: "Are you or have you ever been a professional gambler or gambling
17 promoter?" (Pl.'s SMF, Ex. 16.) The box is marked "No" and the form is signed by
18 Meilstrup under penalty of perjury. (Id.) In Meilstrup's deposition in this action on April
19 16, 2008, the following exchange took place:

20 Q: Okay. Could you just provide me with a high-level description of
21 your employment between the time you graduated from college in '82
until you went to work for GTI?

22 A. Sure. I graduated from college, had a short stint in the nuclear
23 industry, working with Bechtel Power Corporation. Once the nuclear
24 industry collapsed after Three Mile Island, I ended up being a
professional gambler in Reno, Nevada, and from that entered the
gaming industry, and I've held various senior management positions in
casino operations as well as manufacturing of gaming devices.

25 (Pl.'s SMF, Dep. of Jay Meilstrup at 11.)

26 ///

1 Defendants make no effort to explain the inconsistency in Meilstrup's sworn
2 statements, but argue Plaintiff's use of the word "perjury" when Meilstrup has never been
3 charged or convicted of perjury must be stricken and sanctioned. Plaintiff did not state
4 Meilstrup was a convicted perjurer. Plaintiff's use of the word "perjury" is perhaps
5 gratuitous, inflammatory, and argumentative, but Plaintiff had an evidentiary basis for
6 arguing Meilstrup is lacking in credibility due to conflicting statements under oath. The
7 Court will deny Defendants' motion to strike and for sanctions. Additionally, the Court will
8 deny Defendants' motion for sanctions for having to respond to the motion in limine as the
9 motion was not frivolous or otherwise sanctionable.

10 **IV. CONCLUSION**

11 IT IS THEREFORE ORDERED that Plaintiff FortuNet, Inc.'s Motion for Partial
12 Summary Judgment on the Issue of GTI's Violation of Nevada Gaming Law (Doc. #74) is
13 hereby DENIED.

14 IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment
15 (Doc. #75) is hereby GRANTED.

16 IT IS FURTHER ORDERED that Plaintiff's Motion in Limine and to Strike
17 (Doc. #79) is hereby DENIED.

18 IT IS FURTHER ORDERED that Defendants' Cross-Motion to Strike and for
19 Sanctions (Doc. #92) is hereby DENIED.

20 IT IS FURTHER ORDERED that Defendants' Motion to Strike Plaintiff's
21 Expert Disclosure and Report of Scott Scherer and for Entry of Order Precluding Mr.
22 Scherer from Testifying in this Action (Doc. #81) is hereby DENIED.

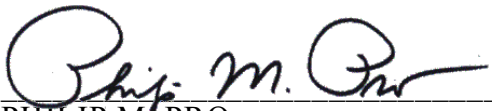
23 IT IS FURTHER ORDERED that Defendants' Request to File Defendants'
24 Opposition to Plaintiff's Motion for Partial Judgment on the Issue of GTI's Violation of
25 Nevada Gaming Law Under Seal (Doc. #87) is hereby GRANTED.

26 ///

1 IT IS FURTHER ORDERED that Defendants' Request to File Defendants'
2 Reply to Plaintiff's Opposition to Defendants' Motion for Summary Judgment Under Seal
3 (Doc. #99) is hereby GRANTED.

4 IT IS FURTHER ORDERED that the parties shall submit cross-briefs on the
5 issue of injunctive relief on Plaintiff's false advertising claims related to advertising GTA
6 as the trademark holder to the name BETS and advertising BETS as class II gaming. The
7 parties shall file opening briefs no later than December 23, 2008. The parties shall file
8 response briefs no later than January 9, 2009.

9
10 DATED: November 26, 2008

11
12 
13 PHILIP M. PRO
United States District Judge